80-256

No.

Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

RODNEY BRUCE GLENN - - - - Petitioner

versus

ROSE L. SHIPP,
DAVID ARMSTRONG, and
PAUL RICHWALSKI - - - - Respondents

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT

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QUESTION FOR REVIEW

Whether Prosecuting Attorneys Have Absolute Immunity to Civil Damage Suits Under 42 USC §1983 and 42 USC §1985 for Acts Other Than Those in Initiating a Prosecution and in Presenting the Case Therefor?

TABLE OF CONTENTS

	PAGE
Question for Review	i
Reports of Decisions Below	1
Jurisdictional Grounds	1– 2
Applicable Statutes and Constitutional Provisions	2– 4
Statement of the Case	4– 6
Reasons for Granting Writ	6–11
Appendix	13–36

TABLE OF AUTHORITIES

Cases:

PAGE

Briggs v. *Goodwin*, 569 F. 2d 10 (C.A. D.C., 1977).. 9

Forsyth v. *Kleindienst*, 599 F. 2d 1203 (C.A. 3, 1979) 8, 9

Helstoski v. *Goldstein*, 552 F. 2d 564 (C.A. 3, 1977) 8, 9

Imbler v. *Pachtman*, 424 U. S. 409 (1976).....7, 8, 10

Jacobson v. *Rose*, 592 F. 2d 515 (C.A. 9, 1976), cert. denied 442 U. S. 930 (1979)..... 9

Constitutional Provisions:

U. S. Constitution, Amendment IV..... 2

U. S. Constitution, Amendment V 2

U. S. Constitution, Amendment VIII..... 2

U. S. Constitution, Amendment XIV §1..... 3

Statutes:

28 U.S.C. §1254..... 2

28 U.S.C. §1331..... 5

28 U.S.C. §1332..... 5

28 U.S.C. §1343..... 5

42 U S.C. §1983.....3, 5, 7

42 U.S.C. §1985.....3–4, 5

SUPREME COURT OF THE UNITED STATES

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No.

RODNEY BRUCE GLENN - - - - *Petitioner*

v.

ROSE L. SHIPP,
DAVID ARMSTRONG, and
PAUL RICHWALSKI - - - - *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT

REPORTS OF DECISIONS BELOW

There are no official or unofficial reports of any Opinions delivered in this case.

JURISDICTIONAL GROUNDS

The Judgment to be reviewed by this Court was rendered and entered by the United States Court of Appeals for the Sixth Circuit on March 5, 1980. The Order of the United States Court of Appeals for the Sixth Circuit denying a rehearing of that decision was rendered and entered by that Court on May 23, 1980.

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit pursuant to 28 USC §1254.

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. Constitution, Amendment XIV §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 USC §1983:

> *Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC §1985:

> *(3) Depriving persons of rights or privileges*
>
> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of de-

priving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

The Petitioner filed this action in January, 1978, against the three Respondents, all prosecuting attorneys in the Jefferson County, Kentucky Circuit Court, as well as against other Defendants, for deprivation of civil and constitutional rights, as well as for malicious prosecution and abuse of process. This action is based

upon 42 USC §1983, 42 USC §1985, and upon diversity of citizenship with monetary claim. Federal jurisdiction is invoked pursuant to 28 USC §§1331, 1332, and 1343.

The Petitioner's claims against the Respondents include allegations of warrantless search and seizure of Petitioner's personal and business records without probable cause, the perpetration of false testimony before a Jefferson County, Kentucky Circuit Court Grand Jury by a respondent prosecuting attorney, assigned to prosecute the Petitioner in that forum, to obtain an indictment for a crime upon which the statute of limitations had already run in order to procure excessive bail requirements, depriving Petitioner of a chance for pretrial release,* the obtaining of a warrant for a needless and harassing "strip search" of Petitioner while incarcerated, and the continuing failure to comply with valid orders of the Jefferson County, Kentucky Circuit Court to return certain properties to the Petitioner after the completion of the criminal trial against him. There exist other allegations against the respondent prosecuting attorneys, and against other defendants in the action, with which this Court need not concern itself for purposes of this Petition.

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*If allowed to develop proof and present evidence Petitioner would have been able to prove that he was extradicted to Kentucky in June 1976, after being arrested in New York in February 1976, arraigned and placed on $25,000 cash bond, that said bond was reduced, but that Respondent Shipp personally testified before the Grand Jury, obtained an additional misdemeanor indictment and had bond set at an additional $50,000 cash by falsely testifying, and that Petitioner therefore remained incarcerated until acquitted of all charges in January 1977.

Rather than filing an Answer to the Complaint of the Petitioners, the Respondent prosecuting attorneys moved to dismiss the entire action against them. Without allowing any discovery, the United States District Court for the Western District of Kentucky did grant said Motion and dismissed all allegations made against the Respondent prosecuting attorneys, basing said dismissal on their alleged absolute immunity to all claims.

Petitioner appealed said dismissal to the United States Court of Appeals for the Sixth Circuit, which court, without oral argument, dismissed said appeal and subsequently denied a Motion for Rehearing.

From that action, this Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit is taken.

REASONS FOR GRANTING THE WRIT

The Petitioner's Complaint (see Appendix, p. 24) sets out factual allegations against the Respondent prosecuting attorneys, based upon various functions of their office, as well as actions taken outside the scope of their status as a prosecutor. Petitioner claims damages for harm suffered due to actions of the Respondent prosecutors of an *investigative* nature, to-wit, the warrantless search and seizure of personal and business records without probable cause and the obtaining of a needless and harassing "strip search." Petitioner seeks damages for harm suffered because of actions of the Respondent prosecutors of an *administrative* nature, to-wit, the failure to comply with a valid court

order to return properties to the Petitioner after the completion of a criminal trial in which Petitioner was acquitted. Also, Petitioner seeks damages for harm suffered due to actions of the Respondent prosecutors which were not within the scope of their prosecutorial duties at all, to-wit, the personal testimony before a Grand Jury to obtain an indictment for a crime upon which the statute of limitations had run.

The United States Court of Appeals for the Sixth Circuit has upheld, without rendering an opinion, the United States District Court for the Western District of Kentucky's dismissal of all claims against the Respondent prosecuting attorneys, based upon this Court's decision in *Imbler* v. *Pachtman,* 424 U. S. 409 (1976).

It is the Petitioner's position that said dismissal not only is in conflict with the very decision upon which it is based, but also is in conflict with decisions rendered by the United States Courts of Appeals for the Third Circuit, Ninth Circuit, and District of Columbia Circuit.

In rendering the above-cited decision, Mr. Justice Powell was very clear in delineating the parameters of the Court's decision. The Court simply held that, in initiating a prosecution and in presenting the State's case therefor, the prosecuting attorney is immune from a civil suit for damages under 42 USC §1983. The Court was very clear in stating that they were not considering in *Imbler* whether or not absolute immunity applied to actions of a prosecutor which were of an

administrative or *investigative* nature. See *Imbler, supra,* pp. 430-431.

By upholding the District Court's dismissal of the entire action against the prosecuting attorneys, the United States Court of Appeals for the Sixth Circuit has expanded the *Imbler* decision beyond the scope very clearly set out in Mr. Justice Powell's Opinion.

Furthermore, and most importantly, this decision raises a conflict between the Sixth Circuit and the Courts of Appeals for the Third, Ninth, and District of Columbia Circuits, all of which have held that prosecutors do not enjoy absolute immunity, across the board, for all functions of their status as a prosecuting attorney.

In *Helstoski* v. *Goldstein,* 552 F. 2d 564 (C.A. 3, 1977), the Court of Appeals reversed a Federal District Court's dismissal of a federal civil rights action against a prosecutor, stating that the *Imbler* decision specifically left unresolved the question of whether absolute immunity extends to the investigative or administrative function of a prosecuting attorney, rather than that of an advocate. That decision further stated that the District Court must determine if some of the allegations did not set out conduct beyond the proper performance of a prosecutor's duty, and could therefore lie outside the rationale of the *Imbler* case. See *Helstoski, supra,* p. 566.

See, also, the decision of the Court of Appeals for the Third Circuit in *Forsyth* v. *Kleindienst,* 599 F. 2d 1203, 1215 (C.A. 3, 1979), wherein the court specifically held that absolute immunity is not available where the

alleged activities of the prosecuting attorney departed from the quasijudicial role of prosecuting a case.

Similarly, the United States Court of Appeals for the Ninth Circuit upheld a District Court which found that a civil damage suit based on an alleged illegal wire tap could not be dismissed based upon an alleged absolute immunity for the defendant prosecutor. That court, in *Jacobson* v. *Rose,* 592 F. 2d 515, 524 (C.A. 9, 1976), cert denied 442 U. S. 930 (1979), held that the cloak of absolute immunity, as set out in *Imbler,* did not exist for police-style or administrative activities of prosecutors.

The United States Court of Appeals for the District of Columbia, in *Briggs* v. *Goodwin,* 569 F. 2d 10, (C.A. D.C., 1977), similarly has indicated that the *Imbler* decision did not provide absolute across-the-board prosecutorial immunity; and in those instances wherein the prosecutor acts outside of those activities intimately associated with the judicial phase of the criminal process, a lesser immunity applied. That Court very clearly held that a prosecutor is not to be granted immunity, merely because of his status, but said immunity is tied to the prosecutor's function. *Briggs, supra,* p. 15.

By its decision in this matter, the United States Court of Appeals for the Sixth Circuit has interpreted the *Imbler* decision as granting a full, absolute immunity to prosecuting attorneys in all instances. This directly conflicts with the decisions in *Forsyth* v. *Kleindienst, supra, Helstoski* v. *Goldstein, supra, Jacobson* v. *Rose, supra,* and *Briggs* v. *Goodwin, supra,*

all of which interpreted the decision in *Imbler* v. *Pachtman, supra,* as only granting an absolute immunity to prosecutors for those functions which were an integral part of the judicial process, and not those of an administrative or investigative nature, or those entirely outside the prosecutorial function.

A conflict exists among Courts of Appeals as to whether or not absolute immunity applies because of the status of the prosecutor, as the Sixth Circuit has held, or because of the function of a prosecutor, as held by this Court, as well as by the United States Courts of Appeals for the Third, Ninth, and District of Columbia Circuits.

A uniform rule for this very important legal issue is needed. In this action, Petitioner alleges damages due to harm suffered because of actions taken by defendant prosecuting attorneys, said actions being of an administrative and investigative nature of their office. In fact, Petitioner alleges damages due to action by a prosecuting attorney, for a *lay* function, that being the rendering of testimony before a Grand Jury while serving as prosecutor, something totally beyond the scope of the prosecutor's duties. The Petitioner's Complaint was dismissed without being allowed to develop any evidence whatsoever upon which to develop the case. Had the Petitioner lived in the Third, Ninth, or District of Columbia Circuits, he would have been allowed to proceed with discovery and to trial.

This conflict between the various Circuits, and even between the United States Court of Appeals for the

Sixth Circuit, and this Honorable Court, due to the Sixth Circuit's interpretation of the *Imbler* decision, must be resolved. Therefore, Petitioners respectfully request that this Petition for Writ of Certiorari to the Sixth Circuit be granted.

Respectfully submitted,

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Charles D. Kaplan
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(502) 589-4215

Counsel for Petitioners

CERTIFICATION

I do hereby certify, as attorney for the Petitioners herein, that the requisite number of copies of this Petition for Writ of Certiorari and the attached Appendix hereto, have been forwarded by First Class Mail, postage prepaid, this ____ day of August, 1980, to the following: Henry A. Triplett, 231 South Fifth Street, Third Floor, Louisville, Kentucky 40202, counsel for David Armstrong; Joseph G. Glass, 118 South Fifth Street, Louisville, Kentucky 40202, counsel for Paul Richwalski; and Rose L. Shipp, 2781 Maple Road, Louisville, Kentucky 40205.

CHARLES D. KAPLAN

APPENDIX

No. 78-3410

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RODNEY BRUCE GLENN and
AMERICAN CARBON ENERGY, INCORPORATED, - - - - - - *Plaintiffs-Appellants*

v.

ROSE L. SHIPP;
PAUL RICHWALSKI; and
DAVID ARMSTRONG, - - - *Defendants-Appellees*

ORDER—Filed March 5, 1980

BEFORE: BROWN, MARTIN, and JONES, Circuit Judges

Having considered the appeal on the merits, the Court affirms the District Court's order of May 24, 1978, dismissing said appeal pursuant to Rule 9(d)3, Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

No. 78-3410

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RODNEY BRUCE GLENN and
AMERICAN CARBON ENERGY, INCORPORATED, - - - - - - *Plaintiffs-Appellants*

v.

ROSE L. SHIPP;
PAUL RICHWALSKI; and
DAVID ARMSTRONG, - - - *Defendants-Appellees*

ORDER—Filed May 23, 1980

BEFORE: BROWN, MARTIN, and JONES, Circuit Judges

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
(s) John P. Hehman
Clerk

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 78-0022-L(B)

RODNEY B. GLENN, et al. - - - - *Plaintiffs*

v.

ROSE L. SHIPP, et al. - - - - - *Defendants*

MEMORANDUM—Entered May 24, 1978

The complaint was filed in this action January 25, 1978, against the 19 named defendants. Jurisdiction is invoked under Title 42 U.S.C. Sections 1983 and 1985 and under Title 28 U.S.C. Sections 1331, 1332 and 1343. Before discussing the pending motions, it is necessary to review the allegations of the complaint and to identify the various parties.

Plaintiff Glenn is a resident of Colorado and is the President and majority stockholder of plaintiff, American Carbon Energy, Inc. (ACE), which is an inactive Delaware corporation.

The defendant, Rose Shipp, is an Assistant Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky; the defendant, Paul Richwalsky, is the First Assistant Commonwealth's Attorney; and the defendant, David Armstrong, is the Commonwealth's Attorney for the 30th Judicial Circuit of Kentucky.

The defendant, James Simpson, is an officer and director of the defendant, Skyuka Mining Corporation. He is a resident of Kentucky.

The defendants, Michael Taines and Ronald Lipton, are directors of Skyuka and residents of Florida.

The defendant, Robert Guterma, is the Executor of the Estate of Alexander Guterma who was a director of Skyuka. The defendant, Robert Guterma, is a resident of Florida, as was Alexander Guterma.

The defendant, Samuel Catsman, is Executor of the Estate of Sandra Guterma who was a director of Skyuka. Catsman is a resident of Florida, as was Sanda Guterma.

The defendant, John W. Waits, is a director of Skyuka and a resident of Kentucky.

The defendant, Robert Metry, is an attorney licensed to practice in Kentucky and is a resident of Kentucky. The complaint alleges that he is "advisor to the Board of Directors of Skyuka."

The defendants, Skyuka Mining Corporation and JOC Coal Company of Kentucky, Inc., are Kentucky corporations.

The defendant, Walter Spooner, is a Special Agent of the Federal Bureau of Investigation and is a Kentucky resident.

The defendant, Rita Crook, is a resident of Kentucky.

The defendants, F. W. Drybrough, Sr. and Corinne Drybrough, are Kentucky residents and are the managing agents of the 800 Apartments in Louisville.

The defendant, John Duess, is a resident of New York and is alleged to be the President of Skyuka or JOC Coal, Inc. or JOC Coal Company of Kentucky, Inc., or all or any combination of them.

JOC Coal, Inc. is a Delaware corporation.

The defendant, Michael Raddish, is a Kentucky resident.

The complaint alleges that in February and March of 1975 the defendant Simpson, as an officer of Skyuka, sold coal to the plaintiffs which was consigned to North Carolina Power Company and Duke Power Company. Apparently, North Carolina Power and Duke Power penalized plaintiffs because the coal was substandard. Plaintiff then

refused to pay the balance due Skyuka under the contract of sale.

According to the complaint the defendant Simpson, on his own behalf and at the behest of the defendants Metry, Taines, Waits, Duess, Lipton and the Gutermas, harassed the plaintiff Glenn, threatening him with prosecution if he did not pay the balance due.

It is alleged that in June, 1975, Simpson procured a warrant charging the plaintiff Glenn with theft by failure to make required disposition of property, an offense denounced by KRS 514.070. It is further alleged that the warrant was procured at the direction of Simpson, Taines, Duess, Waits, Lipton and the Gutermas upon the advice of Metry. Plaintiff alleges that defendants knew that no such offense had been committed.

Pursuant to the warrant, the plaintiff Glenn was arrested and released on bond.

The complaint further alleges that the defendant Crook had lent the plaintiffs $10,000 in the summer of 1975 and that, after plaintiff's arrest, Crook had the defendant Spooner investigate the plaintiffs, which he did, it is alleged, by making illegal searches and seizures.

The complaint next draws aim on the Drybroughs. It is alleged that they illegally padlocked plaintiffs' apartment and office, removed plaintiffs' property and obtained a civil judgment against the plaintiffs. It is further alleged that the Drybroughs, Spooner, Crook and Raddish examined and "rifled" through plaintiffs' papers and files.

The complaint then alleges that the defendants mentioned in the preceding paragraph conspired with Shipp, Richwalsky and Armstrong so that the last-named defendants could investigate the plaintiffs' papers which were ultimately seized.

The next series of allegations sets out that the plaintiff Glenn was arrested in New York by the FBI in February,

1976, and extradicted to Kentncky in May of 1976. He was arraigned in the Jefferson Circuit Court and charged with violation of KRS 514.070 and with bail jumping, KRS 520.070 or 520.080.

The litany of allegations next sets forth that Shipp, acting on her own behalf and on that of Richwalsky and Armstrong, obtained an invalid search warrant and examined and confiscated the contents of a safe deposit box. Shipp is alleged to have testified before the Jefferson County Grand Jury to procure plaintiff's indictment on a misdemeanor charge. This, according to the complaint, was done even though prosecution for the misdemeanor was barred by limitations. It is alleged that Shipp's purpose was to have the plaintiff incarcerated, knowing that he could not make bond.

It is finally alleged at plaintiff's trial a motion for a directed verdict of acquittal was granted on the bail jumping charge, a motion to dismiss the misdemeanor theft charge was granted, and the jury acquitted him of the felony theft charge. At the conclusion of the proceedings against him plaintiff obtained an order from the court directing return of his property, which order remains without compliance.

This action was then instituted.

Defendants Shipp, Richwalsky and Armstrong have moved to dismiss the complaint as to them, relying on *Imbler* v. *Pachtman,* 424 U. S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976). *Imbler* was an action brought under Title 42 U.S.C. Section 1983 against a state prosecuting attorney. It was established that the prosecuting attorney knowingly used false testimony and suppressed material evidence at Imbler's trial. The California court denied his petition for a writ of habeas corpus after a hearing conducted by a special master. Thereafter, Imbler petitioned the United States District Court for a writ of habeas corpus. The

District Court held no hearing but, based on the record, including Pachtman's letter to the Governor of California setting out his post-trial investigation, the District Court issued the writ. On appeal by the state, the Court of Appeals affirmed. *Imbler* v. *California,* 424 F. 2d 631 (9th Cir. 1970), *cert. denied* 400 U. S. 685, 91 S. Ct. 100 (1970). After his release Imbler brought an action under Section 1983 against Pachtman, the prosecuting attorney. In affirming the dismissal, the Supreme Court said:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grant (sic) jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.
>
> * * * *
>
> The common-law rule of immunity is thus well settled. We must now determine whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under §1983. We think they do.
>
> If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be

expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley* v. *Fisher,* 13 Wall., at 348, 20 L. Ed. 646; *Pierson* v. *Ray,* 386 U. S., at 554, 87 S. Ct., at 1217. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

* * * *

We conclude that the considerations outlined above dictate the same absolute immunity under §1983 that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecutions:

> 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.'

Gregoire v. *Biddle,* 177 F. 2d 579, 581 (C.A. 2 1949), cert. denied, 339 U. S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950).

See *Yaselli* v. *Goff,* 12 F. 2d at 404; cf. *Wood* v. *Strickland,* 420 U. S., at 320, 95 S. Ct., at 1000." 96 S. Ct. at 991-993.

Plaintiffs contend that it would be premature to dismiss the action given the present posture of the case. They argue that the "flowery language of Mr. Justice Powell's decision" only *indicates* that absolute immunity attached. Whether one views the language as flowery or merely pedestrian, it is plain and unambiguous. The motion of the defendants Shipp, Richwalksky and Armstrong will be granted. The Court would point out that it has considered *Helstoski* v. *Goldstein,* 552 F. 2d 564 (3rd Cir. 1977), and *Briggs* v. *Goodwin,* 46 U.S.L.W. 2179 (D.C. Cir. 1977), and finds that they are inapposite to the matter pending before the Court. See also *Taylor* v. *Nichols,* 558 F. 2d 561 (10th Cir. 1977).

Perhaps the most noncontroversial motion pending is to permit the substitution of counsel for the defendant Metry, and the motion of Honorable Fielden Woodward to be substituted for Honorable Parker Duncan and Honorable Ann B. Oldfather as counsel for Metry will be granted.

The threshold question remaining after the foregoing discussion is whether this Court has subject matter jurisdiction. As heretofore mentioned, jurisdiction is invoked under Title 42 U.S.C. Sections 1983 and 1985 and under Title 28 U.S.C. Sections 1331, 1332 and 1343.

Section 1983 reads:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citi-

> zen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The troublesome question is whether the acts of which complaint is made were done under color of state law. A prerequisite to the vesting of federal jurisdiction for an alleged wrong under Section 1983 is a deprivation under color of law, that is, there must be some state action, *Watson* v. *Kenlick Coal Co., Inc.,* 498 F. 2d 1183 (6th Cir. 1974), but a mere common law tort is not sufficient to invoke Section 1983 even when committed under color of state law. *Taylor* v. *Nichols,* 409 F. Supp. 927 (D. Kan. 1976), affirmed 558 F. 2d 561 (10th Cir. 1977).

While the Court entertains serious questions as to the sufficiency of the allegations of the complaint and the tendered amendment, it would be premature at this point to dismiss the complaint as to the remaining defendants. The Court will grant the motions of Metry, Waits and the three corporate defendants for a more definite statement and will direct plaintiffs to tender a second amended complaint setting forth *facts* upon which the Court's jurisdiction may be invoked. Such amendment shall be filed within 30 days of the date of this Memorandum and the attached Orders. The Court further reserves ruling on other pending motions until after the tender of the amended complaint. Appropriate Orders have been entered this date.

(s) Thomas A. Ballantine, Jr.
United States District Judge

May 24, 1978.
Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 78-0022-L(B)

RODNEY B. GLENN, et al. - - - - *Plaintiffs*

v.

ROSE L. SHIPP, et al. - - - - - *Defendants*

ORDER—Entered May 24, 1978

For the reasons set forth in the Memorandum filed this date,

It is ORDERED that the motion of the defendants, Rose Shipp, Paul Richwalsky and David Armstrong, to dismiss the complaint as to them be, and it hereby is, granted, and the action is dismissed as to them with prejudice.

This is a final and appealable Order, and there is no just cause for delay.

This 24th day of May, 1978.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:
Counsel of record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 78-0022-L(B)

RODNEY BRUCE GLENN,
Boulder, Colorado and
AMERICAN CARBON ENERGY, INC.
Louisville, Kentucky - - - - *Plaintiffs*

v.

ROSE L. SHIPP, and
PAUL RICHWALSKY, and
DAVID ARMSTRONG, et al., - - - - *Defendants*

COMPLAINT

PRELIMINARY STATEMENT

1. The Plaintiffs herein seek money damages against the Defendants, who have, under the color of state law and otherwise intentionally, wantonly, maliciously and wilfully, individually and in their position as public officials and in consort, deprived the Plaintiffs of their constitutional rghts to freedom of privacy, freedom from illegal searches and seizures, freedom from wrongful arrest, freedom from deprivation of property without due process of law, freedam from malicious prosecution and abuse of process, freedom from false imprisonment, freedom from abuse of office by public officials, and freedom from conspiracy to deny Plaintiffs of the aforementioned rights. The Defendants, acting individually and in consort, and as public officials acting under the color of state law, denied Plaintiffs of these rights, as secured by the Constitution of the United States

and the Amendments thereto, and to their privileges and immunities as citizens under the law, and have done so in a wilful, intentional, malicious, and tortious manner.

JURIDICTION

2. The amount in controversy in this action exceeds $10,000.00, exclusive of interest and costs, and the Defendants in this action are citizens of a state other than that of the Plaintiffs, giving rise to diversity of citizenship, upon which jurisdiction in this matter is based.

3. Further, this action also arises under 42 USC §§1983 and 1985, in that the Plaintiffs' civil rights have been violated by conspiracy and by public officials acting under the color of state law.

4. The Court has jurisdiction to hear these claims as set out pursuant to 28 USC §§1331, 1332 and 1343.

PARTIES

5. Plaintiff, Rodney Bruce Glenn (hereinafter Glenn), is a citizen of the State of Colorado, and he resides in Boulder, Colorado.

6. Plaintiff, American Carbon Energy, Inc. (hereinafter ACE), is a Delaware corporation, licensed to do business in Kentucky. Plaintiff Glenn is the President and majority stockholder of ACE.

7. Defendant, Rose L. Shipp (hereinafter Shipp), is now and has at all times pertinent to this action been a resident of Kentucky and an Assistant Commonwealth Attorney for the 30th Judicial District of Kentucky. She is sued individually, as well as in her official capacity as such, and her address is c/o Commonwealth Attorney's Office, Hall of Justice Building, Louisville, Kentucky 40202.

8. Defendant, Paul Richwalsky (hereinafter Richwalsky), is and at all times pertinent hereto has been the First Assistant Commonwealth Attorney for the 30th Judicial

District of Kentucky. He is sued individually, as well as in that capacity, and his address is c/o Commonwealth Attorney's Office, Hall of Justice Building, Louisville, Kentucky 40202.

9. Defendant, David L. Armstrong (hereinafter Armstrong), is and at all times pertinent hereto has been the Commonwealth Attorney for the 30th Judicial District of Kentucky. He is sued individually, as well as in his official capacity, and his address is c/o Commonwealth Attorney's Office, Hall of Justice Building, Louisville, Kentucky 40202.

10. Defendant, James W. Simpson (hereinafter Simpson), was at all times pertinent hereto President and/or Vice-President and a member of the Board of Directors of the Skyuka Mining Corporation. He is sued individually and in his capacities as such, and is a citizen of Kentucky and resides at R. R. #4, Manchester, Kentucky 40962.

11. Defendant, Michael Taines (hereinafter Taines), was at all times pertinent hereto a member of the Board of Directors of the Skyuka Mining Corporation. He is sued individually and in his capacity as such. He is a citizen of Florida, and resides at 9836 S. W. 14th Street, Boca Raton, Florida 33432. He is a person as contemplated by KRS 454.210 and pursuant thereto is subject to service of process on the Secretary of State of the Commonwealth of Kentucky.

12. Defendant, Robert A. Guterma, is Executor of the estate of Alexander I. Guterma, pursuant to Case No. 77-1021-CT-06, Probate Division, Circuit Court, Palm Beach, Florida. The Defendant's decedent, Alexander I. Guterma, was at all times pertinent hereto a member of the Board of Directors of the Skyuka Mining Corporation. Defendant, Robert A. Guterma, is a citizen of Florida, and his address is 55 S. W. 2nd Avenue, Apartment #102, Boca Raton, Florida 33432. The claims of the Plaintiffs survive the death of the decedent. The Defendant is a person as

contemplated by KRS 454.210, and pursuant thereto is subject to service of process on the Secretary of State of the Commonwealth of Kentucky.

13. Defendant, Samuel Catsman, is Executor of the estate of Sandra Guterma, pursuant to Case No. 77-756-CT-06 of the Probate Division of the Circuit Court of Palm Beach, Florida. Defendant's decedent, Sandra Guterma, was at all times pertinent hereto a member of the Board of Directors of the Skyuka Mining Corporation. Defendant, Samuel Catsman, is a citizen of Florida, and his address is 750 South Ocean Boulevard, Apartment #14-N, Boca Raton, Florida 33432. The claims of the Plaintiffs survive the death of the decedent. The Defendant is a person as contemplated by KRS 454.210, and is therefore subject to jurisdiction of this Court and service of process on the Secretary of State.

14. Defendant, John W. Waits (hereinafter Waits), at all times pertinent hereto was a member of the Board of Directors of the Skyuka Mining Corporation. He is sued individually and in his capacity as such. He is a citizen of Kentucky, and resides at 7305 Shadwell Lane, Prospect, Kentucky 40059.

15. Defendant, Ronald Lipton (hereinafter Lipton) at all times pertinent hereto was a member of the Board of Directors of the Skyuka Mining Corporation. He is sued individually and in his capacity as such. He is a citizen of Florida, and resides at 11900 S. W. 63rd Avenue, Miami, Florida 33101. He is a person as contemplated by KRS 454.210, and therefore is subject to the jurisdiction of this Court, and pursuant to said statute is subject to service of process on the Secretary of State of the Commonwealth of Kentucky.

16. Defendant, Robert Metry (hereinafter Metry), was at all times pertinent hereto a licensed practicing attorney in the Commonwealth of Kentucky and Advisor to the

Board of Directors of the Skyuka Mining Corporation and to other unknown persons liable to the Plaintiffs for actions set out herein. He is sued individually and in his capacity as such. Defendant Metry is a citizen of Kentucky, and his address is 507 Alta Gate Road, Louisville, Kentucky 40206.

17. Defendant, Skyuka Mining Corporation (hereinafter Skyuka), is a Kentucky corporation. They have failed to maintain a service agent, and therefore are subject to service of process upon the Secretary of State of the Commonwealth of Kentucky, pursuant to KRS 271A.070.

18. Defendant, Walter Spooner (hereinafter Spooner), was at all times pertinent hereto an Agent of the Federal Bureau of Investigation, and used and abused his office to further the conspiracy as set out herein. He is sued individually and in his capacity as such. He is a citizen of Kentucky, and his address is c/o FBI, 600 Federal Place, Louisville, Kentucky 40202.

19. Defendant, Rita Crook (hereinafter Crook), is sued individually and is a citizen of Kentucky, whose address is 3906 Accomack Drive, Louisville, Kentucky 40222.

20. Defendant, Frederick W. Drybrough, Sr., a/k/a Fritz W. Drybrough, Sr., a/k/a F. W. Drybrough, Sr., is the chief executive officer and/or member of the Board of Directors and/or Managing Officer and/or owner of the 800 Apartments, Louisville, Kentucky. He is sued individually and in his capacity as such. He is a citizen of Kentucky, whose address is Suite 205, 800 South Fourth Street, Louisville, Kentucky 40202.

21. Defendant, Corinne Drybrough, is the chief executive officer and/or member of the Board of Directors and/or Managing Officers and/or Agent of the owner of the 800 Apartments, Louisville, Kentucky. She is sued individually and in her capacity as such. She is a citizen

of Kentucky, whose address is Suite 205, 800 South Fourth Street, Louisville, Kentucky 40202.

22. Defendant, John Duess (hereinafter Duess), is President of Skyuka Mining Corporation and/or JOC Coal, Inc. and/or JOC Coal Company of Kentucky, Inc. He is sued individually and in those capacities. He is a citizen of New York, whose address is 645 Fifth Avenue, New York, N. Y. 10001. He is a person as contemplated by KRS 454.210, and pursuant thereto is subject to service of process upon the Secretary of State of the Commonwealth of Kentucky.

23. Defendant, JOC Coal, Inc., is a Delaware corporation, and doing business in the Commonwealth of Kentucky. Their agent for service of process is the C. T. Corporation System, whose address is Kentucky Home Life Building, Louisville, Kentucky 40202.

24. Defendant, JOC Coal Company of Kentucky, Inc., is a Kentucky corporation. Their agent for service of process is the C. T. Corporation System, whose address is Kentucky Home Life Building, Louisville, Kentucky 40202.

25. Defendant, Michael Raddish (hereinafter Raddish), is a citizen of Kentucky, whose address is 1546 Twin Drive, Louisville, Kentucky 40213.

26. There are other Defendants unnamed, and unknown to the Plaintiffs at this time. From information and belief, the Plaintiffs believe there are other persons, public officials or individuals, who under the color of state law deprived the Plaintiffs of their civil rights, and conspired to deprive the Plaintiffs of their civil rights.

FACTS

27. During the months of February and March, 1975, Defendant Simpson, as President of and on behalf of Skyuka, negotiated with and sold coal to the Plaintiffs. The contracts of sale provided that the coal was to be con-

signed to North Carolina Power & Light Company and the Duke Power Company, and further provided certain specifications as to the quality of the coal.

28. Pursuant to said contracts, coal shipments were made to North Carolina Power and Duke Power. Said coal was tested and deemed to be of substandard quality, not meeting the specifications set forth in the contracts, and therefore pursuant to the agreement, penalties were assessed against the Plaintiffs, who thereupon paid Skyuka a portion of the sale price but refused to pay the balance.

29. Defendants, Simpson, Metry, Duess, Waits, Lipton, Taines, as well as Alexander I. Guterma and Sandra Guterma, were acting on behalf of Skyuka and JOC Coal, Inc. and/or JOC Coal Company of Kentucky, Inc., said JOC having acquired the assets of Skyuka during April, 1975.

30. Defendant Simpson, acting on his own behalf and upon the direction of Defendants, Metry, Taines, Waits, Duess, Lipton, as well as Alexander I. Guterma and Sandra Guterma, did harass the Plaintiff repeatedly and threaten him with criminal prosecution if the disputed amount was not paid to Skyuka.

31. In or about the month of June, 1975, Defendants, Simpson, Taines, Duess, Waits, Lipton as well as Alexander I. Guterma and Sandra Guterma, and upon advice of Defendant Metry, in consort, did direct Simpson to procure, and he did procure, a criminal warrant against the Plaintiff on the charge of Theft by failure to make required disposition of property as agent (KRS 514.070), although they knew said offense had not been committed.

32. Plaintiff was arrested on August 12, 1975, and arraigned the following day in the City of Louisville Police Court, and released on bond.

33. In the summer of 1975, Defendant Crook did loan $10,000.00 to the Plaintiffs, receiving a Promissory Note with a 12-month maturity date.

34. Between August 12, 1975, and March, 1976, due to the publicity generated by the aforementioned arrest of Plaintiff Glenn, Defendant Crook contacted Plaintiffs and threatened to have an Agent of the FBI assist in the investigation of the Plaintiffs unless the loan was paid immediately. Said Defendant did proceed to have Defendant Spooner investigate the Plaintiffs by making, and he did make, illegal searches and seizures of the personal and business property and effects of the Plaintiffs, said action being taken under the cloak of Defendant Spooner's office as Agent of the Federal Bureau of Investigation.

35. During the same period, Defendants, Frederick W. Drybrough and Corinne Drybrough, illegally padlocked and secured the apartment and office rented to the Plaintiffs and did later without a valid court order and/or permission of the Plaintiffs remove personal property of the Plaintiffs, file civil action against the Plaintiffs, obtain a personal judgment against Plaintiff Glenn, by making false affidavit of Plaintiff's residency status.

36. During the same period of time, Defendants, Spooner, Fritz Drybrough, Corinne Drybrough, Crook, Raddish, and other unknown and unnamed Defendants, did examine and investigate and rifle through the personal and business files of the Plaintiffs without reasonable or probable cause or legal justification or any valid court order.

37. Said Defendants, as set out in the previous paragraph, did further conspire with Defendants, Shipp, Richwalsky and Armstrong, so that these latter persons could also investigate and examine and peruse said personal and business effects and files of the Plaintiffs, all without the Plaintiffs' knowledge or permission, which resulted in seizure of all Plaintiffs' property, both personal and business.

38. Plaintiff was arrested by Agents of the Federal Bureau of Investigation on February 27, 1976, in New

York, New York, and extradited to Kentucky on or about May 26, 1976, and arraigned in Jefferson Circuit Court on the aforementioned charges as well as one count of bail jumping, said Circuit Court arraignment occurring on June 2, 1976. Bond was set at $25,000.00 cash, later amended to $25,000.00 cash or equivalent security.

39. On August 11, 1976, Defendant Shipp, acting on behalf of herself and Defendants Richwalsky and Armstrong, did obtain an invalid search warrant, which allowed her to examine, confiscate and investigate the personal and business effects found in a safe deposit box of the Plaintiffs. They also obtained a warrant for a "strip search" of Plaintiff Glenn, while incarcerated, in front of numerous persons.

40. Soon thereafter, Defendant Shipp, in consort and with permission of Defendants Armstrong and Richwalsky, and with other Defendants unknown and unnamed, did personally appear and testify before the July, 1976 term of the Jefferson County Grand Jury to procure the indictment of the Plaintiff on a misdemeanor charge of conspiring to commit the offense of Theft by failure to make the required disposition of property of a value over $100.00.

41. All of said Defendants conspired with Defendant Shipp to procure said indictment, all knowing that the statute of limitations for said crime had already run, and for the specific purpose of having the Plaintiff rearrested and having another, higher bond set so that Plaintiff would be unable to secure his pretrial release from jail.

42. The bond on the indictment for the misdemeanor was set at the unreasonable sum of $50,000.00 cash, and upon motion of Plaintiff Glenn, the Court ordered a dismissal of the indictment on the misdemeanor, said Court's decision being based upon the statute of limitations having run.

43. On January 27, 1977, the Jefferson Circuit Court directed a verdict of acquittal on the bail jump charge

against Plaintiff Glenn, and the jury returned verdicts of not guilty on the felony theft charges, thereby terminating the entire prosecution in favor of Plaintiffs. At the time of said directed acquittal and verdict of not guilty, Plaintiff Glenn had been incarcerated in the State of New York and in the Jefferson County Jail for a period of eleven (11) months.

44. After completion of said trial, Plaintiff obtained an Order of the Jefferson Circuit Court for the return of all properties being held by the Office of the Commonwealth Attorney of Jefferson County, and as of this date Defendants Shipp, Richwalsky and Armstrong have failed to abide by said Court Orders and relinquish all of said property to the Plaintiff.

CAUSES OF ACTION

45. Plaintiffs incorporate herein by references Paragraphs 27 through 44, inclusive.

46. As a citizen of the United States and pursuant to the Constitution of the United States and the Amendments thereto, Plaintiffs have the constitutional right to be free from malicious and wrongful arrest, to be free from false imprisonment, to be free from malicious prosecution and abuse of process, to be free from abuse of public office, to be free from illegal searches and seizures, and to be free from deprivation of property without due process of law, as well as the right to freedom of privacy. Further, Plaintiffs have the constitutional right to be free from conspiracies for the deprivation of the aforementioned rights.

47. The Defendants have maliciously, wilfully, intentionally, wrongfully, in consort and under the color of state law, deprived the Plaintiffs of their privileges and immunities as United States citizens, and of their constitutionally protected rights as set out in the previous paragraph as follows:

(a) By Defendants Shipp, Richwalsky, Armstrong, Metry, and other unknown and unnamed Defendants, by testifying, procuring and attempting to prosecute the Plaintiff on a misdemeanor indictment on the crime of conspiring to commit the offense of Theft by failure to make required disposition of property over $100.00. Said Defendants proceeded with said action wrongfully and purposely against the Plaintiff Glenn to secure his imprisonment in jail by having a high bond set, by personally appearing and testifying before the grand jury, and by procuring said indictment after the statute of limitations had run.

(b) By Defendants Simpson, Duess, Taines, Waits, Metry, as well as Alexander I. Guterma and Sandra Guterma, and other unknown and unnamed Defendants, in taking out a criminal warrant against Plaintiff Glenn on the felony of Theft by failure to make required disposition of property as agent, for the sole purpose of collecting a possible civil debt, knowing there to be no probable or reasonable cause that any crime had been committed.

(c) By Defendant, Frederick W. Drybrough, Sr., in that he filed civil action against Plaintiff Glenn and obtained an in personam judgment against Plaintiff Glenn, by making false affidavit in the courts of the Commonwealth of Kentucky, as to the residency of the Plaintiff Glenn, following which execution was levied upon assets owned by Glenn and sold at a sheriff's sale to satisfy said judgment.

(d) By Defendants, Frederick W. Drybrough, Sr., Corinne Drybrough, Spooner, Crook, Raddish, and other unknown and unnamed Defendants, in that they illegally and without court order, padlocked the apartment and offices of the Plaintiffs, taking illegal possession of their personal and business property therein,

transporting said property elsewhere in their own domain, all done without proper legal papers, search warrants, or other valid court orders.

(e) By Defendants Shipp, Richwalsky, Armstrong, Frederick W. Drybrough, Sr., Corinne Drybrough, Spooner, Crook, Raddish, and other unknown and unnamed Defendants, in that they examined, procured, transported and took dominion over personal and business effects of the Plaintiffs without probable cause and/or legal court order.

(f) By Defendants Shipp, Richwalsky, and Armstrong, by illegally retaining said personal and business properties and effects of the Plaintiffs in failing to adhere to a valid court order requiring the return of said properties to Plaintiffs.

48. Defendants have injured the Plaintiffs, both individually and in consort, by maliciously prosecuting the Plaintiffs and abusing the judicial process in their action against the Plaintiffs in that they caused felony and misdemeanor warrants to be taken out against the Plaintiffs knowing that Plaintiffs had committed no crime and for the sole purpose of collecting a civil debt by prosecuting the Plaintiffs pursuant to said warrants, knowing the statute of limitations on the misdemeanor offense had already run. Said criminal warrants for felony and misdemeanor resulted in dismissal and/or acquittal by the Court.

DAMAGES

49. Plaintiffs incorporate herein by reference Paragraphs 27 through 48, inclusive.

50. Plaintiffs have suffered or will suffer actual damages for loss of income and power to earn money have been impaired, suffered mental pain and anguish, loss of standing in the community, social and monetary loss with future

business prospects, and much pain and suffering, all to their detriment and damage in the amount of $7,500,000.00.

51. The actions of the Defendants Shipp, Richwalsky, Armstrong, Simpson, Taines, Waits, Lipton, Metry, Spooner, Crook, Raddish, Skyuka, Frederick W. Drybrough, Sr., Corinne Drybrough, Duess, JOC Coal, Inc. and/or JOC Coal Company of Kentucky, Inc., as well as Alexander I. Guterma and Sandra Guterma, have been so wanton, wilful, conspiratorial, intentional and malicious that punitive damages in the amount of $7,500,000.00 should be awarded to the Plaintiffs.

Wherefore, Plaintiffs, Rodney Bruce Glenn and American Carbon Energy, Inc., by counsel, demand:

1. That this Court accept jurisdiction of these claims;
2. Trial by jury;
3. Judgment against the Defendants herein, individually and in their official capacities, jointly and severally, for compensatory damages in the amount of $7,500,000.00 and punitive damages in the amount of $7,500,000.00;
4. For their costs herein expended; reasonable attorneys' fees; and
5. All other relief to which they are entitled.

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Supreme Court, U. S.
FILED
OCT 31 1980
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No. 80-256

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

RODNEY BRUCE GLENN - - - - Petitioner

versus

ROSE L. SHIPP
DAVID ARMSTRONG
PAUL RICHWALSKY - - - - Respondents

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT PAUL RICHWALSKY

JOSEPH G. GLASS
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Louisville, Kentucky 40202
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QUESTION PRESENTED

Whether prosecuting attorneys have immunity from claims for damages asserted against them under the Civil Rights Act, 42 U.S.C. § 1983 and § 1985, where it is not alleged that the prosecuting attorneys were acting other than in their role and capacity as prosecuting attorneys.

INDEX

PAGE

Question Presented i

Table of Authorities iii

Statement of the Case 1

Reasons Why the Writ Should Not Be Granted 1–8

Conclusion 8–9

Certificate of Service 10

TABLE OF AUTHORITIES

PAGE

Coolidge v. *New Hampshire*, 403 U. S. 433, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) 3

Imbler v. *Pachtman*, 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976) 2, 6, 7, 8

Kentucky Rule of Criminal Procedure 5.10 4

Kentucky Rule of Criminal Procedure 5.14 4–5

People v. *Ross*, 156 N. E. 303, 304, Ill., 1927 5

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

No. 80-256

RODNEY BRUCE GLENN - - - *Petitioner*

v.

ROSE L. SHIPP
DAVID ARMSTRONG
PAUL RICHWALSKY - - - - *Respondents*

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT PAUL RICHWALSKY

STATEMENT OF THE CASE

Respondent, Paul Richwalsky, accepts as being substantially correct, the Statement of the Case contained in the Response of Co-Respondents Shipp and Armstrong.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Respondent prosecutors are legally immune from litigation of the type brought by the Petitioner herein.

The Respondent, Paul Richwalsky, hereinafter referred to as Richwalsky for the sake of clarity, at the outset of his brief, wishes to advise this Court that it is not his intention to be repetitive of his co-Respondent's brief. That brief very ably set forth much, if

not most, of the procedure and law believed to be governing or controlling in this litigation. There are, however, a few additional points of law which Richwalsky believes are deserving of the Court's consideration. This this extent, then, it is Richwalsky's intention to supplement the brief heretofore filed by his co-Respondents, Shipp and Armstrong.

Richwalsky recognizes that this Court, in deciding *Imbler* v. *Pachtman,* 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984 (1976), did not intend to confer absolute immunity upon prosecutors for any and all conceivable acts or actions that a prosecutor might make or take. By its decision in that case, this Court preserved the prosecutorial immunity for those acts or actions taken within the scope of the judicial arena but reserved considerations of immunity concerning a prosecutor's "role of administrator or investigative officer." *Imbler, supra,* pp. 430-431.

However, in order to appreciate this appeal in its full perspective, it is urged that a consideration must be given to the facts which were alleged by the Petitioner. Only then can this Court be assured that the District Court reached a proper conclusion by the dismissal of the litigation against the prosecutors, which was then affirmed by the United States Court of Appeals for the Sixth Circuit.

The thrust of the litigation against the prosecutors in this matter is contained in numerical paragraphs 37 through 48 of the Complaint filed by the then Plaintiff, now Petitioner (App., pp. 31-35). In substance, it is alleged that the prosecutors 1) conspired to cause a

search warrant to be issued for the personal and business effects of the Petitioner; 2) had the Petitioner indicted by a Grand Jury; 3) caused the Petitioner, Rodney Bruce Glenn, to be extradited and a high bond to be set in his case; and 4) retained Petitioner's property after Petitioner obtained a Court Order for the return of the property. These specifics represent the very essence of Petitioner's allegations against the prosecutors.

Utilizing no more than the Petitioner's original Complaint, it is urged that nothing is recited in that Complaint which would afford Glenn any relief against the prosecutors. Of the four alleged Civil Rights violations, only the last one contains facts which did not involve an intervening cause that was completely independent of the prosecutorial function.

The search warrant complained of in numerical paragraph 39 of the Complaint was issued by a Judge of the Circuit Court, and was not of the type issued and signed by a prosecutor, as denounced by this Court in *Coolidge* v. *New Hampshire,* 403 U. S. 433, 29 L. Ed. 2d 564, 91 S. Ct. 2022, (1971). Consequently, it must be realized that a Judge, an intervening authority who was completely independent of the prosecutors, weighed the probable cause aspects of an Affidavit and, after such due deliberation, was apparently satisfied that the requisite probable cause existed for the issuance of such a warrant. Therefore, absent an allegation of collusion between the Judge and prosecutors there can be no claim of any deprivation of rights. Simply stated, the signing of the search warrant in this case was a judicial

act by a person whose chief function is to protect the rights of persons, places or things.

Glenn's next Civil Rights contention was that the prosecutors conspired to have Prosecutor Shipp "appear and testify before the July, 1976 term of the Jefferson County Grand Jury to procure (an) Indictment of the Plaintiffs" (App., p. 32). It must be noted that there was no allegation that Mrs. Shipp engaged in perjury before this Grand Jury, although it is now so alleged in the Petition at p. 5. Once again it is important to realize that a Grand Jury is an independent body that examines evidence and considers testimony from witnesses, after which it votes on the matters before it. On this point, Richwalsky calls the Court's attention to Kentucky Rule of Criminal Procedure 5.10 (RCr) which states:

> The Grand Jury shall find an indictment where they have received what they believe to be sufficient competent evidence to support it, but no indictment shall be quashed or judment of conviction reversed on the ground that there was not sufficient competent evidence before the Grand Jury to support the indictment.

It is further believed that RCr 5.14 concerning the duties of the prosecuting attorney is instructive. That Rule states:

> (1) The attorney for the Commonwealth, or his assistant, designated by him, shall attend the grand jurors *when requested by them,* and he may do so on his own motion, for the purpose of examining

witnesses in their presence, or of (sic) giving the grand jurors legal advice regarding any matter cognizable by them. He shall also, *when requested by them,* draft indictments. (Emphasis added.)

(2) The grand jurors may at any time question witnesses in a closed session.

It was the Grand Jury who returned the Indictment against the Petitioner, not the prosecuting attorneys proceeding on their own through an Information. Any complaint about the Indictment in this case should be addressed to the Grand Jury, not to the prosecutors.

Interestingly enough, the Petitioner next complained, in numerical paragraphs 41 and 42, that "the statute of limitations for said crime had already run" and that the bond for the crime "was set at the unreasonable sum of $50,000.00 cash." (App., p. 32). Statutes of limitations are defenses to be specifically pled and are not complete bars to actions. In criminal cases, statutes of limitations have been held to be an act of grace or a surrendering by the government of its right to prosecute. *People* v. *Ross,* 156 N. E. 303, 304, Ill., 1927. Without doubt, if the Petitioner had failed to specifically plead the running of the statute of limitations, he would have faced trial on the charge.

The complaint about unreasonable bail must fail as well because it is the Court that establishes the specific financial conditions of bail, not the prosecutors. It is unquestionably true that prosecutors are called upon to make recommendations to the Court about bail in par-

ticular cases, as was probably the situation here, but the ultimate responsibility for setting bail always rests with the Court. Moreover, if a particular criminal defendant believes that bail is excessive, remedies are available to him for relief through such legal instruments as Writs of Mandamus or Habeas Corpus, as examples.

The remaining act of the prosecutors which the Petitioner tried vainly to raise to a violation of Civil Rights involved the failure of the prosecutors to abide by "an Order of the Jefferson Circuit Court for the return of all properties being held by the Office of the Commonwealth Attorney of Jefferson County." (App., p. 33). Richwalsky submits that this allegation, if it were true in its premises, should have been the easiest issue of all for the Petitioner to resolve because adequate remedies at law were available to the Petitioner —remedies which are still available for that matter, of the complainant is in fact, really wronged. It would or should be a relatively simple matter for the Petitioner to file a motion with the Jefferson Circuit Court to require the prosecutor(s) to show cause why she or they should not be held in contempt of Court for failing to comply with a valid order of that Court. That Court, then, could get to the heart of that issue in relatively short order.

Without a doubt, the activities of the prosecution officers alleged in the Complaint of the Petitioner, if true, would be outside the scope of the Supreme Court's decision in *Imbler* v. *Pachtman, supra.* Further, it is conceded that by strict definition these alleged activi-

ties would come within the categories of administrative and/or investigative duties in that it is the normal function of a prosecutor's office to assist in the marshalling of evidence in a case brought to them; making judgments about the prosecutorial merits of a case; assisting in the presentation of a case before a Grand Jury in those cases deemed worthy of consideration by that body; initiating proceedings for the return of persons indicted who are in other jurisdictions; participating in bail hearings involving defendants seeking such relief; and finally representing the sovereign as its advocate in trial. To this described extent, it is difficult to really separate the functions of the office of the prosecutor since, by its very nature, it involves administrative, investigative and advocacy roles. Such an office would ill function if these various roles were trisected with independent functionaries at the helm of each.

If the prosecutors in this case had the powers attributed to them by the Petitioner then perhaps this would fit within the exceptions reserved for future decision by this Court in *Imbler, supra,* pp. 430-431. However, that power simply did not exist in this case. The Grand Jury made the decision to indict the Petitioner and Judges made the decisions to sign search warrants and set bail — decisions of an entirely independent nature. Any other interpretation, it would seem, would imply that prosecutors are puppeteers and Grand Juries and Judges are puppets.

Based upon the considerations heretofore discussed, it is Richwalsky's belief that the matter has, in effect,

now come full circle to the return to this Court's decision in *Imbler, supra,* and the District Court's dismissal of the matter herein predicated upon that decision. In the absence of the four issues previously detailed there remains only the generalized allegation about the Petitioner being "free from malicious prosecution," which may or may not apply to the trial proceedings. (App., p. 33). If the phrase does apply to the issues already articulated by the Petitioner, then no further discussion is needed. However, if that phrase applies to the trial itself, then surely that allegation is clearly disposed of by the decision in *Imbler, supra.*

Respondents, Shipp and Armstrong, have discussed the Circuit Court of Appeals' cases cited by the Petitioner. Consequently, Richwalsky, choosing not to be redundant would only agree that the facts of those cases are, he believes, clearly distinguishable from the facts of this case. Here, the decision to indict was made by the Grand Jury; the decision on the sufficiency of the search warrant affidavit and about bail was that of a Judge — all constitutional bodies or offices vested with the authority to act as they did, and for these reasons it is urged that the Complaint of the Petitioner cannot be sustained under any existing legal theory.

CONCLUSION

The Petitioner is placing an improper construction upon the various Court's interpretations of prosecutorial immunity. In an effort to give viability to his

litigation he is trying to persuade this Court that any actions outside the scope of the actual trial itself are areas of liability of prosecutors. Such broad interpretations are absolutely incorrect. It is believed that the Petitioner wants to be able to engage in a fishing expedition, which the very language of the Complaint allegations simply will not justify.

While this Court has not finally decided what degree of immunity, if any, a prosecutor may enjoy in the role of administrator or investigator, Richwalsky realizes that such decisions will take into consideration the particular or peculiar circumstances or facts of the prosecutorial role. Normally, it is true, many facts must be developed after the filing of the suit. Here, however, pertinent facts are contained in the Complaint itself. The Petitioner tries to blame prosecutors for the constitutionally approved actions of others. On the face of the Complaint, the dismissal was proper.

WHEREFORE, Richwalsky respectfully prays that this Court, after due deliberation and consideration, will affirm the Judgments of the District Court and the United States Court of Appeals for the Sixth Circuit, by denying the Petition for Writ of Certiorari.

Respectfully submitted,

JOSEPH G. GLASS
118 S. Fifth Street
Louisville, Kentucky 40202

Counsel for Respondent,
Paul Richwalsky

CERTIFICATE OF SERVICE

It is certified that three (3) copies of the foregoing Brief for Respondent, Paul Richwalsky, were personally delivered to the offices of Hon. Charles D. Kaplan and Hon. S. Arnold Lynch, 414 Marion E. Taylor Building; and, Hon. Henry A. Triplett, 231 South Firth Street, all of Louisville, Kentucky 40202, this the 20 day of Oct., 1980.

JOSEPH G. GLASS
Counsel for Respondent,
Paul Richwalsky

Supreme Court, U. S.
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No. 80-256

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

RODNEY BRUCE GLENN - - - Petitioner

versus

ROSE L. SHIPP,
DAVID ARMSTRONG,
PAUL RICHWALSKY - - - - - Respondents

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ROSE L. SHIPP AND DAVID ARMSTRONG

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QUESTION PRESENTED

Whether or not State prosecuting attorneys have absolute immunity from claims for damages asserted against them under the Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985, where it is *not averred* that the prosecuting attorneys were acting other than in their role and capacity as prosecuting attorneys, and whether or not there are clearly different holdings between or among the United States Circuit Courts of Appeals.

INDEX

	PAGE
Table of Authorities	iii
Question Presented	i
Statement of the Case	2– 3
Reason Why the Writ Should Not be Granted	3–10
Conclusion	11
Certificate of Service	12

TABLE OF AUTHORITIES

	PAGE
Briggs v. *Goodwin*, 569 F. 2d 10 (CA D.C. 1977)	8
Bruning v. *United States*, 376 U. S. 358, 11 L. Ed. 2d 772, 84 S. Ct. 906	9
Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985 ..	4
Commissioner v. *Bilder*, 369 U. S. 499, 9 L. Ed. 2d 65, 82 S. Ct. 881	9, 10
Forsyth v. *Kleindienst*, 599 F. 2d 1203 (CA 3 Pa. 1979)	7
Gregoire v. *Biddle*, 177 F. 2d 579 (CA 2 N.Y. 1949)..	5, 8
Helstoski v. *Goldstein*, 552 F. 2d 564 (3d Cir. N.J. 1977)	8
Imbler v. *Pachtman*, 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984	3, 7, 8
Jacobson v. *Rose*, 592 F. 2d 515 (CA 9 Nev. 1978) ...	7
Kentucky Revised Statutes, Chapters 69.010 and 69.180	2
SS Monrosa v. *Carbon Black Export*, 359 U. S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710	10

SUPREME COURT OF THE UNITED STATES

October, 1980 Term

No. 80-256

RODNEY BRUCE GLENN - - - *Petitioner*

v.

ROSE L. SHIPP,
DAVID ARMSTRONG,
PAUL RICHWALSKY - - - - *Respondents*

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, ROSE L. SHIPP AND DAVID ARMSTRONG

STATEMENT OF THE CASE

At all times material to this litigation, the respondent, David Armstrong, was the Commonwealth Attorney for the 30th Judicial District, which includes Louisville and Jefferson County, Kentucky. The respondent, Paul Richwalsky, was the first Assistant Commonwealth Attorney, and the respondent, Rose L. Shipp, was an Assistant Commonwealth Attorney.

The duties of the Commonwealth Attorney, the first Assistant Commonwealth Attorney, and the Assistant Commonwealth Attorney are set forth in Chapters 69.010 and 69.080 of the Kentucky Revised Statutes. The duties are to prosecute violations of the criminal

and penal law within the particular district they serve.

It is alleged that the Commonwealth Attorneys obtained an invalid search warrant and that they obtained a warrant for a strip search of the plaintiff, Rodney Glenn. Paragraph 40 avers that they procured an indictment on a misdemeanor charge and paragraph 41 says that they did this knowing that the limitation statute had run and for the purpose of having the plaintiff rearrested and a higher bond set. Paragraph 44 claims that certain property was ordered to be returned by the Jefferson Circuit Court and this has not been done. The subaverments in paragraph 47 appear to be a reiteration of those previously discussed.

Petitioner claims that the action of the respondents are outside the protection afforded them by *Imbler* v. *Pachtman,* 424 U. S. 409, 47 L. Ed. 2d 128, 96 S. Ct. 984, and that the decision of the Court of Appeals for the Sixth Circuit conflicts with decisions made by United States Courts of Appeals for the Third Circuit and Ninth Circuit and the District of Columbia.

The United States District Court for the Western District of Kentucky granted the respondents' motion to dismiss the complaint and this was summarily affirmed by the United States Court of Appeals for the Sixth Circuit. See appendix to petitioner's Petition for Writ, 13-23.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

Respondents disagree with both of petitioner's claims. Respondents assert that the most liberal construction of the petitioner's complaint still places respondents' action well within *Imbler* v. *Pachtman, supra,* and respondents further assert that a careful reading of cases cited by the petitioner in support of his claim that there is a burning dispute between and among circuits relative to the meaning of *Imbler* v. *Pachtman, supra,* show they are not supportive of the claim.

The following facts were present in *Imbler* v. *Pachtman, supra.* Pachtman was a District Attorney. It was alleged that he had engaged in a conspiracy to unlawfully charge and convict Imbler by knowingly or negligently using false evidence and further that he suppressed material evidence at the criminal trial. This Court held Pachtman enjoyed absolute immunity and in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under the Civil Rights Act, 42 U.S.C. 1983 and 42 U.S.C. 1985. This Court always gave consideration as to whether a prosecutor should enjoy only qualified immunity or whether he should have absolute immunity. The Court said:

> "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution.

A prosecutor is duly bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. Bradley v. Fisher, 13 Wall, at 348, 20 L. Ed. 646; Pierson v. Ray, 386 U. S., at 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

We concluded that the considerations outlined above dictate the same absolute immunity under §1983, that the prosecutor enjoys at common law. To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. Moreover, it often would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice. With the issue thus framed, we find ourselves in agreement with Judge

Learned Hand, who wrote of the prosecutor's immunity from actions for malicious prosecution:

> 'As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.' Gregoire v. Biddle, 177 F. 2d 579, 581 (CA 2, 1949), cert. denied, 339 U. S. 949, 94 L. Ed. 1363, 70 S. Ct. 803 (1950).

See Yaselli v. Goff, 12 F. 2d, at 404; cf. Wood v. Strickland, 420 U. S., at 320, 43 L. Ed. 2d 214, 95 S. Ct. 992."

It is not alleged in petitioner's complaint that respondents acted other than in their capacity as Commonwealth Attorneys, which imposed upon them the duty to prosecute violations of the criminal and penal laws within the 30th Judicial District. Securing a search warrant, a warrant for a strip search, procuring an indictment, investigation, examining and pursuing personal effects and business effects are all within the scope of the duties and obligations of a Commonwealth Attorney. The Commonwealth Attorney is a conservator of the peace. None of the actions alleged can be divorced or severed from the usual duties and obligations of a Commonwealth Attorney. Paragraph 37 says that the respondents conspired with other defendants so that respondents could investigate and examine and pursue said personal and business effects and files of the plaintiff without his knowledge or per-

mission and this resulted in a seizure of the plaintiff's property, both personal and business. It is difficult to decipher what this paragraph means and it is further impossible to determine what the petitioner meant by it. Paragraph 39 says that the respondents obtained an invalid search warrant which allowed examination, confiscation and investigation of personal and business effects found in a safety deposit box, and that they further obtained a warrant for a strip search. This is what Commonwealth Attorneys are supposed to do and it is part and parcel of their obligations and duties in the prosecution of criminal offenses alleged to have occurred within their jurisdiction. Paragraphs 40 and 41 allege that the respondent, Shipp, testified before the Grand Jury and procured petitioner's indictment knowing the limitation statute had run and for the purpose of having petitioner re-arrested and a higher bond set.

None of these averments come close to an allegation that a prosecutor knowingly used false evidence and knowingly suppressed material evidence in order to secure a conviction, as was alleged in *Imbler* v. *Pachtman, supra.* Prosecuting attorneys frequently appear before Grand Juries to establish pro forma matters, *i.e.,* previous convictions, the fact that a defendant did not appear, statistics, and the like. None of this can be reasonably divorced from the usual conduct of a prosecuting attorney and such pro forma appearance does not transform a person from a prosecutor to a witness.

Petitioner is wrong when he claims that the United States Court of Appeals are in conflict about the construction of *Imbler* v. *Pachtman, supra.* In *Jacobson* v. *Rose,* 592 F. 2d 515 (CA 9 Nev. 1978), the Court found that the prosecuting attorneys joined in implementing a wire tap, permission for which had expired. This was a statutory claim. The Ninth Circuit said the acts there were related to police activities as opposed to judicial activities and, therefore, absolute immunity was not present. Respondents have some reservations about this holding, but even so, it is not a law difference but a fact difference at most. *Forsyth* v. *Kleindienst,* 599 F. 2d 1203 (CA 3 Pa 1979), involved a warrantless electronic surveillance authorized by the Attorney General of the United States. The Court held that the record did not disclose whether the Attorney General was functioning as an administrator or whether he was securing information to determine whether to initiate a criminal prosecution and, accordingly, the Court would remand the case to determine that question. The Court concluded by saying, "We hold that the Attorney General will be absolutely immune from suit for his decision to authorize the warrantless electronic surveillances only if his decision was made in the performance of a function that is intimately related to the judicial process." The Court further said, "The decision to initiate a criminal prosecution, which we believe includes some limited right to gather information necessary to make that decision, is one such protected function."

First, this case supports respondents' view, and second, it does not represent a conflict with any other circuit. Nor does *Helstoski* v. *Goldstein,* 552 F. 2d 564 (3d Cir. 1977), support petitioner or represent a conflict because there the prosecutor deliberately leaked unfavorable and false information to the press. The Court said that this appeared to be outside of the rationale for absolute immunity. We have some problem reconciling all of this with *Gregoire* v. *Biddle,* 177 F. 2d 579 (CA 2 N.Y.), which case is cited in *Imbler* v. *Pachtman, supra,* as part of the basis for the decision there. *Briggs* v. *Goodwin,* 569 F. 2d 10 (CA DC 1977), is not helpful because the Court said that the special prosecutor was really an investigator as opposed to a prosecutor, and while we have some reservations about the holding of Briggs, particularly in light of the thoughtful dissent, it again does not represent such a major difference of opinion between or among circuits as to justify granting the writ here, nor is it analagous fact-wise here.

It must be remembered that the petitioner does not allege at any time that the respondents were acting outside of their normal and judicially related roles of prosecutors. Petitioner does not allege the Commonwealth Attorneys were investigators, police, special prosecutors, or that they did anything that Commonwealth Attorneys in Kentucky don't usually do when deciding whether to initiate a prosecution.

Petitioner asserts as his reason for granting the petition that there is a dispute between or among the Circuit Courts of Appeal. Respondents understand

that this can be a reason for this Court agreeing to hear a case. It is respondents' contention that the claimed dispute is fanciful and not real. Just because a different result may come from an individual court does not mean a dispute or difference of opinion exists. The difference in the cases cited by the petitioner to some degree involve subjective findings of fact by a particular court, but no damage seems to have been done to the basic proposition that prosecuting attorneys are immune from damages in a civil rights claim. In *Commissioner* v. *Bilder,* 369 U. S. 499, 9 L. Ed. 2d 65, 82 S. Ct. 881, we find the following language:

> "Because of a subsequent contrary holding by the Court of Appeals for the Second Circuit, Carasso v. Commission, 292 F. 2d 367, and the need for a uniform rule on the point, we granted certiorari to resolve the conflict. 368 U. S. 912, 8 L. Ed. 2d 130, 82 S. Ct. 193."

In *Bruning* v. *United States,* 376 U. S. 358, 11 L. Ed. 2d 772, 84 S. Ct. 906, the following is stated:

> "Due to an apparent conflict between circuits and the potentially recurring nature of the question involved, we granted certiorari, 375 U. S. 920, 11 L. Ed. 2d 164, 84 S. Ct. 264. We affirm the decision below."

In *SS Monrosa* v. *Carbon Black Export,* 359 U. S. 180, 3 L. Ed. 2d 723, 79 S. Ct. 710, this Court said:

> "Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the extent to which these bill of lading provisions may

be given effect by our courts can await a day when the issue is posed less abstractly."

Applying these statements to the case at bar, respondents do not find a recurring problem, the necessity of a judicial resolution by this Court, or a clear conflict as found in *Commissioner* v. *Bilder, supra.*

CONCLUSION

The District Court had little trouble with this case, and the Court of Appeals less. Petitioner has not, in our judgment, sustained his heavy burden to warrant this Court granting the writ he seeks.

WHEREFORE, the respondents, Rose L. Shipp and David Armstrong, respectfully demand that the Petition for Writ of Certiorari be denied and that they recover all other and proper relief in the premises as the circumstances warrant.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 1980, three copies of this Brief in Opposition on behalf of Respondents, Rose L. Shipp and David Armstrong, were mailed, postage prepaid to Mr. S. Arnold Lynch and Mr. Charles D. Kaplan, Attorneys for Petitioner, 414 Marion E. Taylor Bldg., Louisville, Kentucky, and Mr. Joseph G. Glass, Attorney for Respondent, Paul Richwalsky, 118 South Fifth Street, Louisville, Kentucky.

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